U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Y-F-C-

DATE: NOV. 14, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a technical manager, seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.[1]

On appeal, the Petitioner submits additional documentation and a brief asserting that he is eligible for the EB-2 classification as an individual of exceptional ability and for a national interest waiver under the *Dhanasar* framework.

Upon *de novo* review, we will remand the matter to the Director for further action and consideration.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

[1] The Director did not make a finding regarding the Petitioner's claimed eligibility as an individual of exceptional ability.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

[2] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

A. Member of the Professions Holding an Advanced Degree

In the decision denying the petition, the Director found that the Petitioner qualified for classification as a member of the professions holding an advanced degree, stating: "USCIS accepts that an advanced degree . . . is required by the occupation, and that [the Petitioner] holds the requisite advanced degree." For the reasons discussed below, we withdraw the Director's determination on this issue.

In order to show an individual is a professional holding an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Petitioner presented his bachelor of science degree in engineering technology from [redacted] University in [redacted] and his official academic record from the university. The record reflects that he

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

received the aforementioned bachelor's degree on May 6, 2016. Although the Petitioner holds a U.S. baccalaureate degree, he has not demonstrated at least five years of progressive post-baccalaureate experience in his specialty at the time he filed the Form I-140.[4] Accordingly, we withdraw the Director's finding that the Petitioner qualifies as a member of the professions holding an advanced degree.

B. Exceptional Ability

The Petitioner's March 2018 letter accompanying the Form I-140 specifically stated that he was seeking classification as "an individual of exceptional ability with respect to vapor phase decomposition (VPD) systems and technology." In addition, the Petitioner's response to the Director's request for evidence listed four of the regulatory criteria for individuals of exceptional ability and he provided evidence relating to those criteria: 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (E), and (F). In his appeal brief, the Petitioner maintains that he meets the regulatory criteria for classification as an individual of exceptional ability. The Director's decision did not address whether the Petitioner satisfies at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.

C. National Interest Waiver

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien." The denial decision stated that the Petitioner did not provide "a properly completed Application for Alien Employment Certification (Form ETA-750B) or Application for Permanent Employment Certification (ETA Form 9089), Parts J, K, and L. Therefore, since the petitioner did not submit this required evidence, USCIS must deny the Form I-140." At the time of filing, however, the Petitioner offered a properly signed and executed ETA Form 9089, Parts J, K, and L. Accordingly, the Director's finding on this issue is withdrawn.

In addition, the Director's decision did not render findings as to whether the Petitioner satisfies prongs one and two of the *Dhanasar* analytical framework. Furthermore, with regard to prong three of the *Dhanasar* precedent decision, the Director's analysis stated twice that the Petitioner had not demonstrated "a substantial impact" in the field. We note that while the Petitioner's technological contributions and the national interest in these contributions are relevant factors for consideration under prong three of the *Dhanasar* framework, there is no requirement that a petitioner demonstrate "a substantial impact" in the field in order to satisfy this prong. The Director's prong three analysis was also problematic because it did not consider the Petitioner's arguments and evidence relating to the impracticality of labor certification due to his self-employment, job creation associated with his proposed endeavor, and whether the national interest in his technological contributions is sufficiently urgent to warrant foregoing the labor certification process.

[4] The Form I-140 was filed on March 23, 2018. With respect to the Petitioner's five years of progressive post-baccalaureate experience in his specialty, he must demonstrate such experience at the time of filing. *See* 8 C.F.R. § 103.2(b)(1).

III. CONCLUSION

We are therefore remanding the petition for the Director to consider whether the Petitioner has satisfied the eligibility requirements for classification as an individual of exceptional ability. In addition, the Director should properly apply all three prongs of the *Dhanasar* analytical framework to make a determination as to whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision which, if adverse, shall be certified to us for review.

Cite as *Matter of Y-F-C-*, ID# 5130934 (AAO Nov. 14, 2019)